

Private Antitrust Enforcement - Indicative List of Interview Questions for Practitioners

I. General questions

1. Is there any demand for legal advice (or legal representation) in relation to private antitrust litigation? If yes, is the demand increasing or decreasing?
2. On whose behalf, are being brought the private antitrust damages claims, which you are dealing with (i.e. consumers; SMEs; large purchasers)?
3. What is your client base (e.g. claimants or/and defendants; local or/and foreign clients)?
4. Roughly what proportion of your private antitrust claims are follow-on and stand alone? Are your follow-on claims preceded by decisions of the UK Regulators and/or the European Commission?
5. Does Brexit have any impact on the number of claimants issuing proceedings in England and Wales which follow-on from the European Commission's decision?
6. In relation to your follow-on claims, do claimants try to go beyond the (geographical and temporal) scope of regulators' decisions by seeking damages in relation to different geographical areas and time periods?
7. Roughly what proportion of your private antitrust cases have an international element (e.g. involving a party or parties from another jurisdiction; suing for damages which occurred in another jurisdiction)? Has Brexit affected anyhow the behaviour of your clients in cross-border disputes?
8. What is the type/s of legal remedy (e.g. financial, declaratory, injunctive) which your clients most commonly seek to achieve in cross-border cases?
9. Roughly what proportion of your private antitrust claims are in relation to cartels and abuses of dominant positions, respectively? Are there any claims against high-tech giants?
10. What is the most common outcome in an antitrust claim for damages in which you were involved?

II. Central aspects of private antitrust enforcement regime and “pre-action conduct”¹:

11. Do potential claimants consider how effective and efficient the UK private antitrust enforcement regime is, in terms of facilitating their access to legal remedies, before deciding whether to issue any competition law proceedings in this country?
12. Given the cross-border nature of many competition law infringements, do potential claimants consider how effective and efficient some other available national regimes are?
13. What are the major attributes (e.g. value of the claim; facts, including any prior regulators' decision; the amount of pass through; costs and litigation funding) which are factored in when you are assessing the relative strength of their claim? Which attribute/s would be most important in this respect?
14. Do potential claimants consider whether a foreign regulator's decision (finding a competition law infringement) will be binding in England and Wales before deciding on the jurisdiction in which to bring their action? Does Brexit affect certain claimants' (or categories of claimants) decision-making process in this respect?

¹ See Civil Procedure Rules: Practice Direction – Pre-Action Conduct and Protocols.

15. Which procedural aspect (e.g. case-management timeline; pass-through disclosure and evidence; timeline for econometrics review, meetings of experts and exchange of data; estimate decision times re any preliminary procedural points; appeal times), do you think, is the most important for a party's decision to issue proceedings and continue to actively engage with them (rather than settle)? Are there any different aspects which are considered by various categories of claimants (i.e. consumers; SMEs; large purchasers)?
16. In competition law claims, do potential claimants consider what legal remedies they would be entitled to recover under potentially different applicable competition enforcement regimes? Why?
17. Which substantive law aspect (e.g. pass through; limitation periods; assessment of damages; compound interest), do you think, is the most important for a party's decision to issue competition law proceedings in one jurisdiction rather than another?
18. Do you come across competition law cases where multiple claimants are suing (including any collective redress proceedings)? Is it common or is it somewhat increasingly common? Do the UK collective redress mechanisms facilitate injured parties' access to legal remedies? Why?
19. Do you come across competition law cases where multiple defendants are being sued? Is it common? Why?
20. Do defendants coordinate their defence-strategies?
21. Is competition litigation expensive? Is it more expensive in comparison with other types of commercial litigation? What is a very rough cost estimate for a typical private antitrust claim?
22. Do claimants (or certain categories of claimants) seek financial assistance with regard to costs from any of the litigation funders (or from any other sources, perhaps)?
23. What is/are the stages at which the claimants are incurring a higher level of costs?

III. Litigants' strategies after the proceedings are issued

24. What are the factors that affect the strategy of a potential defendant who is threatened with a competition law claim against them to wait until they are sued or to engage in settlement negotiations or to rather issue proceedings in another jurisdiction or to defend and prepare for the trial? Would the strategy be different depending on who is bringing the claims (i.e. consumers; SMEs; large purchasers)?
25. What are the major attributes in relation to competition law claims (e.g. facts; value of the claims; costs and claimants' access to finance) which are factored in by defendants in terms of organising their defence and assessing the defendants' exposure to damages, once a claim is issued against them?
26. What are the major aspects of the private antitrust regime [binding nature of regulator's findings of infringement; procedural rules (including evidence); applicable substantive laws, including assessment of damages] which are considered by defendants when deciding on their strategies?
27. Do you think defendants facing a strong claim (or relative strong claim) would rather exploit any procedural deficiencies (e.g. delaying disclosure and evidence; prolonging the econometrics review, meetings of experts and exchange of data; raising preliminary procedural points)?

28. Would the response to the previous question be different, if the value of the desirable remedy is high (or very high, perhaps which could potentially impact on defendants' exposure to costs and damages)? Why?
29. What is/are the stages at which the defendants are incurring a higher level of costs?
30. Are you satisfied with the functioning of the UK collective redress regime? Why?
31. Are jurisdictional challenges common in cross-border competition law cases? Why?

IV. Settlements

32. Do competition disputes tend to settle after any preliminary and pre-trial issues have been dealt with by the courts in this country? Or do they proceed to a final judgment on the merits? Why?
33. Have you come across settlements in cross-border cases at an early stage (ie even before issuing court proceedings)? Is it more likely for such cases to involve large purchasers (rather than consumers)? Why?
34. Do procedural efficiencies and any deficiencies impact on the settlement dynamics? Would the impact on different parties be different?
35. Have you come across any delaying tactics in competition law cases where claimants have a strong (or relative strong claim) – especially if there are multiple injured parties and the limitation has not expired yet? If yes, what are the most common types? Do such tactics impact (if at all) on settlement dynamics?
36. Do costs in competition cases affect the suing decisions of different parties (i.e. consumers; SMEs; large purchasers), and their willingness to settle?
37. Would the cost-shifting rules impact on the behaviour of the defendants and any settlement dynamics? Does the response to this question differ depending on the value of the desirable financial remedy?
38. Do costs in competition law cases affect the settlement dynamics?
39. Do any parallel proceedings in other jurisdiction affect defendants' willingness to continue with litigation and any settlement offers (including various settlement discounts)? Why?
40. What is a rough estimate proportion of your law firm's private antitrust cases that settled in the last 5 years?
41. What were the factors which drove settlements in your cases which settled?
42. What is a very rough estimate proportion of a typical settlement discount (considering the initial value of the claims) in competition cases?
43. What are the factors which hinder settlements in cases which are still pending?

V. Concluding Questions

44. Should there be a case management mechanism in England which allows for all claims at all levels of a supply chain to be centralised and dealt with by a single specialist forum?

45. Do parties often argue about the applicable law in cross-border competition law cases? Is a dispute about the applicable law preceded by opposing parties' assessments about their entitlement/liability under the relevant applicable substantive laws?
46. Do you come across parallel and related competition law proceedings? Are regulators and courts often involved in related proceedings?
47. Should there be a higher level of judicial cooperation in antitrust matters (avoiding parallel proceedings and facilitating the recognition and enforcement) with a view to promoting global settlements, perhaps?
48. Should the UK collective redress regime permit for foreign class members to be involved with English and Welsh court proceedings on an opt-out basis (i.e. going beyond what is possible under the current regime)?
49. Are you satisfied with the way in which regulators and courts cooperate in competition law cases? Might a greater anticipation of private enforcement within UK regulatory regime (e.g. regulators requiring certain investigated parties to preserve and gather the data and documentary evidence potentially required to assess effects of the investigated infringements) improve access to justice?
50. Under what circumstances, do digital markets pose new challenges for policy-makers and regulators?
51. Do you have any other concerns which we have not discussed?